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Tilting at Windmills: Defamation and the Private Person in Cyberspace

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TILTING AT WINDMILLS: DEFAMATION AND THE PRIVATE PERSON IN CYBERSPACE

INTRODUCTION

Imagine you are a partner in a successful and well-respected law firm specializing in securities. For no apparent reason, clients, in rapid succession, begin calling and terminating your services. After the third disastrous call, you feel compelled to ask your now former client why he is dropping your firm. His answer, that he is "not in the business of having a professional relationship with people engaged in criminal activity," astounds you. When asked how he came about such an inference, the former client responds, "everyone knows you're being investigated by the SEC—it's been posted on a business message board on a computer bulletin board system for days."

In this situation, what recourse do you, as a private citizen, have for a defamatory message? Under traditional defamation law, your remedy is greatly limited. You can only sue the defamer if you can identify him. The board operator will probably not be liable unless he exercises sufficient editorial control. Likewise, the business owner of the computer bulletin board system may not be liable if he exercises only minimal editorial control, or if he has little or no relationship with the board operator. The result may be patently unfair because a private citizen may suffer irreparable harm from the libel but be without any legal recourse.

The questions of identification, degree of editorial control, and agency liability do not, in the young, dynamic medium of computer communication, allow for easy application of a medieval defamation doctrine. However difficult the application, the need to redress defamation in this new medium is increasingly important in modern society.

> In an organized and centralized society, where at least economic relationships are likely to be based on an impersonal or reputational level as opposed to the more decentralized and personal approach characteristic of a bygone era, how we are perceived takes on greater

> significance. For better or worse, in today's world, most of us are known by our images.[1]

In the computer communication medium, there is very little practical opportunity for self-help when a private person is defamed to an untold multitude by a computer network.

This Note proposes a modification of traditional defamation law in an attempt to more equitably distribute liability in the computer medium. Part I provides a technical introduction to computer bulletin boards and system operators. Part II describes the fundamental elements of defamation law and their application to various communication technologies. Part III describes the fundamental elements of agency law. Part IV analyzes the two cases that have addressed the issue of computer media defamation liability. Finally, Part V discusses several court approaches to liability of computer media and develops an appropriate combination of remedies for computer defamation of a private person.

I. CYBERSPACE TECHNOLOGY

The technology that drives "cyberspace" is divisable into two parts. The first part, computer Bulletin Board Systems (BBSs), provides the mechanical backdrop for the informational exchanges.[2] The second part, the system operator, provides the human interface the decisions from which affect the entire culture and feel of the computer bulletin board.[3]

A. Computer Bulletin Boards

The growth in computer BBSs[4] has been explosive. Over 100,000 BBSs currently operate worldwide,[5] serving in excess of twenty-five million users.[6] One reason for the phenomenal

1. Brown v. Kelly Broadcasting Co., 771 P.2d 406, 426 (Cal. 1989) (quoting Rouch v. Enquirer & News of Battle Creek, 398 N.W.2d 245, 264-65 (1987)).

2. *See infra* notes 4-23 and accompanying text.

3. *See infra* notes 24-26 and accompanying text.

4. The computer bulletin board functions as the modern day equivalent of the archaic business or community bulletin board but with heretofore unheard of breadth and speed of communication possibilities. A BBS can be considered a "public storage area in the host computer of an online service." Edward V. Di Lello, *Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLUM. J.L. & SOC. PROBS. 199, 205 (1993).

5. Rex S. Hienke & Heather D. Rafter, *Rough Justice in Cyberspace: Liability on The Electronic Frontier*, 11 COMPUTER LAW. 1, 2 (July 1994).

6. May Liang, *Intellectual Property and the National Information Infrastructure*,

expansion of BBSs is the relative ease and inexpense of setting up a BBS.[7] All that is required is at least one computer with information storing capacity; a host BBS software program, which controls the computer and allows users access to the stored information;[8] and a modem, which allows digital information to be transmitted and received over telephone lines.[9] The expense associated with the start-up may be as little as $2000.[10]

A system user needs a personal computer, a modem, and a telephone to access a computer service. The user simply dials the phone number of the service and, via modem, is electronically connected to the service. Depending on whether the BBS is a free system or a commercial service (which requires some form of subscription fee), the user may not have access to all possible sections of the individual BBS.[11] The most popular sections typically available on BBSs include: public message areas, electronic mail, and electronic information sources.

In a public message area, users can transmit and post their own messages and read messages previously posted by others.[12] The larger commercial BBSs have multiple public message areas arranged by topic.[13] These areas are popular due to the large available audience and the speed of the postings, which allow for interactive conversations.[14] Once a message is sent, it is typically posted instantaneously and may be read by anyone who has access to that specific section for an indeterminate period of time.

PRACTICING L. INST., Sept. 1995, at 1. This is a marked increase from 12.2 million users in 1993. Graeme Browning, *Hot-Wiring Washington*, NAT'L J., June 26, 1993, at 1625.

7. This ease has allowed for the relatively nontechnical computer hobbyist to set-up and run a BBS on an individual basis. *See* Hienke & Rafter, *supra* note 5, at 2.

8. Loftur E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 207 (1989).

9. Sandra Sugawara, *Computer Network to Ban 'Repugnant' Comments*, WASH. POST, Oct. 24, 1991, at A1.

10. Robert Beall, Note, *Developing a Coherent Approach to the Regulation of Computer Bulletin Boards*, 7 COMPUTER L.J. 499, 501 (1987).

11. Andrew Pollack, *Free Speech Issues Surround Computer Bulletin Board Use*, N.Y. TIMES, Nov. 12, 1984, at A1.

12. *See* T.R. Ried, *Computers Becoming Nation's Bulletin Board: Communication is Easy and Little Regulated*, WASH. POST, July 19, 1985, at A4.

13. *See* Liang, *supra* note 6, at 1-5.

14. PHILIP L. BECKER ET AL., INTRODUCTION TO PC COMMUNICATIONS 76, 185 (1992).

Electronic mail (E-mail) allows a user to send private mail directly to other users.[15] These messages are not posted to the general board, but are addressed to a specific individual who can retrieve the electronic message only by using the proper combination of name and password.[16] These messages are typically transmitted without any interference or oversight from the operator of the board.[17]

Electronic information sources are generally interactive as well, and may also include electronic shopping malls,[18] data storage capabilities,[19] software exchanges,[20] and information databases.[21] The informational databases can be quite extensive and diverse and typically include electronic newsletters and news wires, such as those provided by the Associated Press and the Dow Jones. Databases may also include electronic newsletters that are specifically developed by the BBS.[22] The information sources are generally provided to the BBS through contract or licensing agreements.[23]

B. System Operators

Each BBS is run by its system operator (SYSOP). The SYSOP must make value and business judgments in many areas in the course of establishing and maintaining a BBS.[24] These areas range from operational choices—such as means of access, monitoring policies, and the board's "ambiance"—to mechanical choices such as the appropriate software and hardware package.[25] Because of the many choices a SYSOP makes, it is

15. Becker, Jr., *supra* note 8, at 211.
16. *Id.*
17. *Id.* at 212.
18. Liang, *supra* note 6, at 3.
19. *Id.*
20. *Id.*; Becker, Jr., *supra* note 8, at 212-13.
21. Liang, *supra* note 6, at 3 (CompuServe Inc. providing online information and database services).
22. An example of this type of publication is the Rumorville newsletter that was at issue in Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).
23. *See Cubby*, 776 F. Supp. 135; Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995).
24. *See generally*, BECKER ET AL., *supra* note 14, at 341-60.
25. *See* David R. Johnson & Kevin A. Marks, *Mapping Electronic Data Communications Onto Existing Legal Metaphors: Should We Let Our Conscience (and Our Contracts) Be Our Guide*, 38 VILL. L. REV. 484, 511-12 (1993) ("[A] SYSOP can, in general, first decide how he . . . wants the electronic 'space' to be configured. . . .").

difficult to encompass the breadth of a SYSOP's responsibilities in a single, legally meaningful definition.[26] Thus, in order to determine an appropriate standard of care, each SYSOP must be treated individually and his tort liability analyzed with respect to his individual operational and mechanical choices.

II. DEFAMATION AND COMMUNICATIONS-APPLIED ANALOGIES

The computer media presents unique problems for the application of traditional defamation doctrine. The medium has characteristics that can be found to be analogous with print publishers, broadcasters, bookstores, libraries, physical bulletin board operators, and common carriers.[27] Unfortunately, the liability for defamation with regard to these entities differs widely.[28] The question becomes whether any of these analogous entities supplies an appropriate standard for "cyberspace" defamation.

A. Defamation

Defamation traditionally requires a "publication" by the defendant of a false and defamatory communication, of and concerning the plaintiff, to a third person, and which would have the effect of damaging the plaintiff's reputation.[29] A statement is considered published if it is communicated, either intentionally or negligently, to a third party who understands the communication.[30] A defamatory publication is libel if it is communicated by written or printed words or by any other means which has the permanent characteristic of written or printed words.[31]

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26. It has been suggested that SYSOPs have the following characteristics: (a) they invest both time and money into their BBS; (b) they do not generally personally know the BBS members; and (c) they do not normally personally interact in the informational exchanges between members. *See* Beall, *supra* note 10, at 512.

27. *See infra* notes 50-68 and accompanying text.

28. *See infra* notes 29-45 and accompanying text.

29. *See* Kennedy v. Children's Serv. Soc'y of Wis., 17 F.3d 980, 983 (7th Cir. 1994); Guaranty Nat'l Ins. Co. v. International Ins. Co., 994 F.2d 1280, 1284 (7th Cir. 1993); RESTATEMENT (SECOND) OF TORTS § 577 (1977).

30. *See generally* Geraghty v. Suburban Trust Co. 208 A.2d 606, 609 (Md. 1965); W. PAGE KEETON ET. AL, PROSSER AND KEETON ON THE LAW OF TORTS 798 (5th ed. 1984).

31. RESTATEMENT (SECOND) OF TORTS § 568 (1977).

Constitutional imperative requires the plaintiff to prove some degree of fault to prevail in a defamation case.[32] In an action brought by a private person against a media defendant, the plaintiff has to show only that the defendant was negligent with regard to truth or falsity to recover for actual injury due to defamation.[33] A higher standard, requiring "actual malice," is used when an action is brought by a public person against a media defendant on matters of legitimate public interest.[34] Actual malice requires that the libelous statement be made knowingly or with "reckless disregard" for the truth for the plaintiff to prevail.[35] Because this Note concerns defamation actions brought by private persons on matters not of public interest, it is assumed a court would apply the former negligence standard.[36]

Existing law has developed a sliding scale of liability for those who distribute defamatory information. However, the general rule is as follows: the more discretion a disseminator of news has to modify the published information, the higher is the disseminator's duty of care and corresponding liability.[37] The original defamer—the author or editor—as well as the publishers of magazines, newspapers, and books, are generally considered primary publishers and are fully liable for defamation.[38] A primary publisher is considered to have knowledge of the defamatory material because it is assumed that he is creatively involved in the process of publication.[39] If the defendant is a

32. *See* Dun and Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323, 328 (1974); New York Times v. Sullivan, 376 U.S. 254, 267 (1954).

33. *See Gertz*, 418 U.S. at 347-48.

34. *New York Times*, 376 U.S. at 279-80.

35. *Id.*

36. This Note is not concerned with the question of whether the act of posting a message on a BBS makes the plaintiff a public figure or whether the matter becomes one of public interest that would require the plaintiff to prove "actual malice." *Gertz*, 418 U.S. at 349. The use of the "actual malice" standard is only required when punitive damages are sought. *Id.* at 350. The court is left with the option to choose a lower standard of care (*i.e.*, a negligence standard) for actual damages if it so desires. *Id.* at 349-50; *see* Messina v. Tri. Gas Inc., 816 F. Supp. 1163 (S.D. Tex. 1993). For a discussion of the applicability of public-figure doctrine see Thomas D. Brooks, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461 (1995).

37. This rule simply expresses the concept that liability as a "publisher" or a "distributor" is proportional to the amount of editorial control exercised. *See infra* notes 38-45 and accompanying text.

38. KEETON ET. AL., *supra* note 30, at 810.

39. *Id.; see, e.g., New York Times*, 376 U.S. at 263 (holding that newspaper is

media defendant, the owner of the publication will be vicariously liable for the defamation.[40]

Bookstores and libraries are secondary publishers and are liable only if they know or have reason to know that the information they are transmitting is defamatory.[41] Secondary publishers are not required to investigate the contents of what they distribute in order to preclude liability.[42] The secondary publisher's ignorance of the defamatory material and his inability to modify the defamatory statement justifies this lower standard of liability.[43]

Finally, telephone and telegraph companies are considered mere conduits of information and not publishers. As such, they are not liable at all.[44]

On this sliding scale of liability, dissemination of information via computer likely constitutes publication and a person (assuming he can be identified) who provides the defamatory information to the computer system would be a primary publisher.[45] The real question is in determining where, along the scale of liability, the BBS and SYSOP should be in relation to this person's activities.

B. Communication Analogies

Analysis of the proper liability of BBSs and SYSOPs requires a comparison with other analogous communication entities. These include broadcast and print media (as primary publishers),[46] bookstores and libraries (as secondary publishers),[47] physical

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potentially liable for republishing advertisement).

40. KEETON ET AL., *supra* note 30, at 803.

41. *See* Church of Scientology v. Minnesota St. Med. Ass'n Found., 264 N.W.2d 152, 156 (Minn. 1978); RESTATEMENT (SECOND) OF TORTS § 581, cmt. d, e (1977); KEETON ET AL., *supra* note 30, at 803-04.

42. RESTATEMENT (SECOND) OF TORTS § 581, cmt. d (1977).

43. News vendors have been held liable for selling obscene material but this is typically done under obscenity statutes and not under common law. *See* New Hampshire v. Manchester News Co., 387 A.2d 324, 328-29 (N.H. 1978); New Jersey v. DiPiano, 375 A.2d 1169, 1172 (N.J. Super. Ct. App. Div. 1976).

44. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 612 (1977).

45. This is analogous to a person writing a defamatory statement to a large group of people. This is a defamatory communication, of a presumably damaging nature, to a third person. In the computer media, the defamatory communication is published when it is entered into "cyberspace" which effectively acts as the required third person.

46. *See infra* notes 50-58 and accompanying text.

47. *See infra* notes 59-64 and accompanying text.

bulletin board operators (as potential primary publishers),[48] and common carriers (as immune entities).[49]

1. *Broadcast and Print Media*

Print media have traditionally been held liable as primary publishers for the material they put forth.[50] The courts, in general, require knowledge of the defamatory message by the publisher, but with print media indulge in the legal fiction that everything in printed form is "known" to some employee of the publisher, thus making the publisher liable for that employee's knowledge.[51] The print media cases recognize that the primary publisher always has an opportunity, equivalent to the author's, to remove the offending material.[52]

The broadcast media seem to pose a more difficult problem. Unlike print media, in which it is assumed that the publisher knows of and can remove the defamatory material, a broadcast of defamatory material can occur without the broadcaster's knowledge. If a person utters a defamatory message on a live radio or television talk show, how is the broadcaster treated? As a primary publisher? A secondary publisher? Or simply a conduit? The modern trend in broadcast law, driven by constitutional and legislative considerations, is to find the broadcaster liable for what it did not know would be published only if it was negligent in determining whether the message was defamatory.[53]

While the questions are different for print and broadcast media, the constitutional standard of negligence applies to both.[54] If either the BBS or the SYSOP fails to exercise reasonable care in its editorial function (a function analogous to print media) or in its screening function (a function analogous to broadcast media), a court should find the negligent party liable.

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48. *See infra* notes 65-66 and accompanying text.

49. *See infra* notes 67-68 and accompanying text.

50. KEETON ET AL., *supra* note 30, at 797.

51. *See* Masson v. New Yorker Mag., 832 F. Supp. 1350, 1372 (N.D. Cal 1993) (holding agency relationship cannot serve to impute liability for defamation to publisher absent employment relationship); KEETON ET AL., *supra* note 30, at 810.

52. KEETON ET AL., *supra* note 30, at 810.

53. *See* Kelly v. Hoffman, 61 A.2d 143, 147 (N.J. 1948) (facilities rented to defamer); Summit Hotel Co. v. NBC, 8 A.2d 302, 312 (Pa. 1939).

54. *See supra* notes 29-40 and accompanying text.

The difficulty in applying the print media standard to computer bulletin boards lies in determining whether the BBS or the SYSOP exercised sufficient control over the distributed information for the courts to impute "knowledge" and thus find that the party or parties acted as primary publishers. The sheer volume of incoming material might seem too overwhelming for the SYSOP or the BBS to monitor. However, software exists that can filter the message traffic and send questionable messages to the human interface for further interpretation.[55] With an increasing interface and greater opportunity for significant contact with the libelous message before it is disseminated, the SYSOP and BBS should accordingly be held to a higher standard of care analogous to that of a print publisher.[56] One court, in fact, has applied this standard, showing that a print media standard can be properly applied to BBSs and SYSOPs whose policies allow and support extensive editorial control over the material that is published on their network.[57]

The broadcast media standard could be appropriately applied to analogous portions of computer media that feature rapid interactive communication such as public message areas and electronic information sources. The instantaneous nature of the electronic conversation is analogous to the radio or television talk show host's interactive conversations. However, the radio and TV talk show is not necessarily instantaneous nor unfiltered. These types of shows typically utilize some form of call screener and delay mechanism to delete offending speech. These actions recognize that the medium has the potential to harm both private and public interests, and prudent measures are appropriate to avoid liability. Similarly, BBSs do not necessarily have to be instantaneous. Like the print media, current hardware and software can screen messages for obvious defamation at a very rapid rate.[58] This allows both rapid

55. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794, 1796 (N.Y. Sup. Ct. 1995) (demonstrating use of a software screening program).

56. *Id.* at 1798.

57. *Id.*

58. *See* Michael Hill, *Comparing Industry Pushes the Speed Limit: New IBM Computer Will Be 300 Times Quicker Than Today's Fastest Computer*, AUSTIN AMERICAN-STATESMAN, Oct. 28, 1996, at D1. Computer hardware and software manufacturers continue to make exponential improvements in overall computer speed. *See* Lynn Voedisch, *The Need for Speed: Companies Are Rushing to Make Faster Computers*, CHICAGO SUN-TIMES, Oct. 24, 1996, at 37. The continued economic pressure to produce a new and faster microprocessor should ensure an increasing

conversation and interaction between users and sufficient screening to satisfy a reasonable care standard.

2. *Bookstores and Libraries*

Most commentators and courts analogize the computer media to informational distributors such as libraries and bookstores with limited liability as secondary publishers.[59] The bookstore analogy seems appropriate for most BBSs because, they typically argue, they do not exercise control over the content of the material even though they reserve the right to remove defamatory material when it is brought to their attention.[60] While these actions seem to limit the liability of BBSs, they do not address the liability of the SYSOP. Most SYSOPs actively interact with their systems and attempt to control the flow and content of information to keep the board on point.[61] This interaction could raise the SYSOP's liability if it were shown that there was sufficient editorial control to impute knowledge to the SYSOP.[62] With sufficient control, the SYSOP would be more appropriately considered a primary publisher rather than a secondary publisher.[63]

The limited liability of news dealers as distributors is normally an equitable standard.[64] Typically, if a person is defamed in material sold by a news dealer, he has recourse against the primary publisher of the material, which is generally a commercial enterprise. At a minimum, the actual publisher is known. This is not the case in the computer media. A BBS bulletin board has the power to project defamatory material to a

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viability to screen interactive messages without degrading user services.

59. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991); *Stratton*, 23 Media L. Rep. (BNA), at 1798; Becker, *supra* note 8, at 227-28 ("[C]omputer bulletin board operators should be treated . . . like news vendors, libraries, and telegraph companies.").

60. *See Cubby*, 776 F. Supp. at 140; *Stratton*, 23 Media L. Rep. (BNA), at 1796.

61. *See Stratton*, 23 Media L. Rep. (BNA), at 1796.

62. *See generally id.*

63. The distributor concept demands that, once SYSOP knowledge is established, the court must inquire into whether the SYSOP acted with reasonable care. A failure to use reasonable care would result in liability.

64. The rationale for the distributor exception to defamation liability is not supplied in the second Restatement of Torts nor in any of the restatement draft records. *See generally* RESTATEMENT (SECOND) OF TORTS (1977). However, allowing limited liability for a party operating under a "profit motive" should only be allowed if the defamed party has recourse against some other responsible party.

far larger audience than the traditional medium, and moreover the defamer, if he is even identified, may not be a commercial enterprise and may be individually judgment proof. The effect of distributor nonliability is an inequitable allocation of liability and risk in the computer media.

3. *Physical Bulletin Board Operators*

As a physical medium, it is appropriate to analogize material posted on a BBS to material posted on a physical bulletin board. Physical bulletin board operators have typically been held liable for the publication of defamatory messages put on their property when they become aware of the message's defamatory nature and fail to remove the message within a reasonable period of time.[65] Therefore, a posting on a computer system might cause both the BBS and the SYSOP to incur liability if they fail to remove a message within a reasonable time after being informed of the message's defamatory nature. A "reasonable time" in the computer medium should be the time required for the SYSOP to delete the message from the computer file—a matter of minutes at most.

The analogy of computer network media to physical bulletin boards fails, however, with respect to the relative permanence of the defamatory material. Typically, in physical bulletin board cases, all residual traces of the defamatory message are removed when, for example, the toilet wall is cleaned or painted over. This is not necessarily true in computer media, because any defamatory message posted on the BBS can be downloaded by another user. A simple application of the physical bulletin board analogy to computer media would allow a BBS or SYSOP to hide behind their lack of knowledge while defamatory material was being widely disseminated and downloaded off their system.

In addition, the computer media, through its mass dissemination, results in a much greater public exposure to the defamatory message than the classic physical bulletin board case. Therefore, even the prompt removal of a libelous statement by a

65. *See* Tacket v. General Motors Corp., 836 F.2d 1042, 1046-47 (7th Cir. 1993) (when an allegedly defamatory sign remained visible for eight months, a company was liable for continued publication due to its unreasonable failure to remove the sign earlier); Hellar v. Bianco, 244 P.2d 757, 759 (Cal. Dist. Ct. App. 1952) (holding property owner knowingly failed to remove defamatory material on a men's room wall within a reasonable period of time).

BBS/SYSOP fails to adequately address the impact of such widespread harm to a private person.

4. Common Carriers

Common carriers, such as telephone, telegraph, and microwave communication services, enjoy immunity from liability for the transmission of defamatory messages, if they do not have knowledge of the defamer's lack of privilege to send the message.[66] This limited liability is based on the rationale that the common carrier has an obligation to serve the public, and it ensures efficiency and privacy to not require obtrusive monitoring of rapid, mechanical processing of voluminous, mundane messages.[67]

Public message areas, electronic information sources, and E-mail are BBS sections that typically require rapid transmission of messages similar to common carriers. However, both public message areas and electronic information sources are fundamentally different from the typical telephone call. The expectation of privacy of the message is reduced due to the public nature of the computer posting and the ability of the BBS and SYSOP to view the message. The large number of potential readers of the message is more akin to the audience of a radio and television show, which would argue for a higher level of liability than common carrier status would allow.

E-mail may be more appropriately analogized to a common carrier such as a telephone company. The message is private with only the addressed user being able to open and read the document. There is no interaction between the BBS, the SYSOP, and the users beyond the BBS acting as a mere conduit for the private message. In such a private electronic message system, a limited common carrier liability is appropriate and serves the public purpose as there is no dissemination to the general public. The only publication that incurs liability in the E-mail context

66. *See* Mason v. Western Union Tel. Co., 125 Cal. Rptr. 53, 57 (Cal. Ct. App. 1975) (common carrier has privilege to transmit defamatory material in the ordinary course of business absent proof of actual malice); Von Meysenbug v. Western Union Tel. Co., 54 F. Supp. 100, 101 (S.D. Fla. 1944) (no presumption of malice by common carrier transmitting libelous material; liability requires proof of actual malice, knowledge, or bad faith); RESTATEMENT (SECOND) OF TORTS § 612, cmt. g (1977).

67. *See Von Meysenbug*, 54 F. Supp. at 101.

occurs when the defamer sends the defamatory message to a third party via the computer conduit.

It should be obvious that a normal commercial BBS with its multiple sections and services may be publisher, distributor, and common carrier at any given time. Noting this, a court should analyze the actions of the BBS and SYSOP within the specific computer section of the BBS where the alleged defamatory statements are made in order to ascertain the proper standard of liability to impose.

III. AGENCY LAW

Defamation liability in the cyberspace community is further complicated by the industry's widespread use of independent contractors. The tangled employment relationships between the owners of the BBSs and the SYSOPs require application of agency law principles to determine potential liability for any defamatory material placed on the BBS. Tort liability may or may not flow between two parties, depending on whether the relationship is classified as a principal-agent relationship or a contractee-independent contractor relationship.

Generally, a person is not liable for the harms created by another.[68] The exception to this is when a legally recognizable relationship between the parties creates a duty to guard against harm.[69] In principal-agent relationships, the doctrine of respondeat superior holds the principal liable for any and all tortious conduct committed by his agent within the scope of his employment.[70] The courts justify holding the principal vicariously liable for the agent's conduct by a simple and deliberate allocation of risk.[71] The courts rationalize that the principal is in the best position to allocate the risk of the tortious

68. *See generally* Murdock v. United States, 951 F.2d 907, 909 (11th Cir. 1991) (holding owner not liable for negligence of independent contractor).

69. *See generally id.*

70. *See* Douglass v. Hustler Magazine, 769 F.2d 1128, 1140 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1985) (finding the doctrine of respondeat superior to be fully applicable in suits for defamation notwithstanding limitations the First Amendment places on the tort); Blanton v. Moses H. Cone Mem. Hosp., Inc., 354 S.E.2d 455, 457 (N.C. 1987) (respondeat superior is a doctrine which makes a principal liable for the acts of an agent within the scope of the principal's authority). *See generally* REUSCHLEIN & GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 52 (2d ed. 1990).

71. *See* United States v. Romitti, 363 F.2d 662, 665 (9th Cir. 1966).

activity through the purchase of insurance and price modification.[72]

Liability between the various parties is further confused by the likelihood of the agent hiring people to accomplish the required work. A sub-agent is "a person appointed by an agent . . . to perform functions undertaken by the agent for the principal."[73] The principal and the agent each bear responsibility for the sub-agent's acts if the sub-agent is expressly or impliedly authorized by the principal.[74] If an agent employs another without the express or implied consent of the principal, the relationship is termed an agent's agent, and the agent incurs full responsibility for the actions of his agent while the principal retains no liability.[75]

Courts have long recognized a distinction between agents and independent contractors with respect to the employer. Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[76] In contrast, an independent contractor is "a person who contracts with another to do something for him, but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."[77] The independent contractor may or may not be an agent.[78] If the principal contractee lacks the right to control, the independent contractor is not considered an agent, and any torts committed by the independent contractor are generally the sole responsibility of that independent contractor. Thus, there is no vicarious liability on the part of the contractee.[79]

The question of whether a contractor is an agent or an independent contractor is normally a question of fact.[80] This issue properly becomes one of law for the court only if there is a

72. *Id.*
73. RESTATEMENT (SECOND) OF AGENCY, § 5 (1958).
74. REUSCHLEIN, *supra* note 71, § 2.
75. *Id.*
76. RESTATEMENT (SECOND) OF AGENCY, § 1(1) (1958).
77. *Id.* § 2(3).
78. *Id.*
79. REUSCHLEIN, *supra* note 71, § 51.
80. C.C. v. Roadrunner Trucking, Inc., 823 F. Supp. 913, 920 (D. Utah 1993); *see* Holdaway v. Gustanson, 632 F. Supp. 393, 397 (D. Wyo. 1986).

material conflict in evidence, if the terms of the contract are not ambiguous or disputed, and if only one inference may be made.[81]

The difference in liability between contractors that are actual independent contractors and those characterized as agents has led to the development of a multi factor test for determining the existence or nonexistence of the right to control. These factors include: (a) the extent of the contractee's control over the details of the independent contractor's work; (b) whether the independent contractor in question is engaged in a distinct occupation; (c) whether the occupation is the kind that normally operates under supervision; (d) the skill required to perform the work; (e) the length of time the person is employed and the method of payment; (f) whether the work is part of the contractee's regular business; and (g) whether the parties thought their relationship was one of master and servant or contractee and independent contractor.[82] "The crucial factor is the right of control which must exist to prove agency."[83] A contractee need not have exercised the right of control, he must simply have the right of control.[84] Not all the factors must be present, and no single factor is conclusive, but all the factors relate in some fashion to the critical issue of right of control.[85]

A contractual agreement that merely identifies the tortfeasor as an "independent contractor" of the contractee will not change the legal relationship of the parties.[86] If the contractee has the right of control, he may be held liable under the respondeat superior doctrine.[87] The courts look beyond the potentially fictional contractual label to the real working relationship between the parties.[88]

Finding that a contractor is an independent contractor does not totally exempt the contractee from being found liable, as the rule of nonliability of a contractee for harms caused by the

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81. Foster v. Board of Trustees of Butler County Community College, 771 F. Supp. 1122, 1130 (D. Kan. 1991); *Holdaway*, 632 F. Supp. at 398.

82. Chapman v. Black, 741 P.2d 998, 1001 (Wash. Ct. App. 1987).

83. *Id.* at 1002.

84. *Id.* at 1003.

85. *Id.* at 1001.

86. *See* Bradbury v. Phillips Petroleum Co., 815 F.2d 1356, 1360-61 (10th Cir. 1987).

87. Because the contractee has control, the relationship is that of a "principal-agent" and the principal is subject to liability. *See* Blanton v. Moses H. Cone Mem. Hosp., Inc., 354 S.E.2d 455, 457 (N.C. 1987).

88. *See In re* Shulman Transp. Enters., Inc., 744 F.2d 293, 295 (2d Cir. 1984).

independent contractor's tortious acts has numerous exceptions.[89] These exceptions generally fall within three broad categories: (1) negligence of the employer in selecting, instructing, or supervising the contractor; (2) nondelegable duties arising out of some relationship to the public or a particular plaintiff; and (3) work that is specially, peculiarly, or inherently dangerous.[90]

Under the first exception—negligence of the employer—the contractee's own activities or lack thereof in conjunction with the work performed by the contractor may be cause for liability.[91] He must take reasonable precautions for actions over which he maintains at least some control and which may pose a foreseeable risk of harm to the public.[92] This liability is not vicarious, but is simply based on the contractee's own personal negligence.[93]

The nondelegable duty exceptions "arise in situations in which, for reasons of policy, the employer is not permitted to shift responsibility for the proper conduct of the work to the contractor."[94] These nondelegable duty exceptions go beyond the negligence of the employer concept by vicariously imposing liability on a contractee for the contractor's negligence despite a contractee having done all that could reasonably be required of him.[95] There is no bright line upon which courts base their policy decisions regarding the nondelegable duties of a contractee, but an appropriate criterion for courts to use may be "that the responsibility is so important to the community that the employer should not be permitted to transfer it to another."[96]

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89. Indeed, the Restatement Second of Torts comments that the exceptions are so numerous that the general rule of non-liability for independent contractors "is applied when no good reason is found for departing from it." RESTATEMENT (SECOND) OF TORTS § 409, cmt. b (1977)).

90. *Id.*

91. *See* Lopez v. A/S D/S Svenberg, 581 F.2d 319, 323 (2d Cir. 1978); United States v. Aretz, 280 S.E.2d 345, 350-51 (Ga. 1981).

92. *See* Deerings W. Nursing Ctr. v. Scott, 787 S.W.2d 494, 496 (Tex. Ct. App. 1990); Norfolk and Western Ry. v. Johnson, 154 S.E.2d 134, 139-40 (Va. 1967) (employer's responsibility depends upon a foreseeable probability that injury will result from the characteristic risks of the assigned work); KEETON ET AL., *supra* note 30, at 510.

93. KEETON ET AL., *supra* note 30, at 510.

94. RESTATEMENT (SECOND) OF TORTS § 415 (1977).

95. KEETON ET AL., *supra* note 30, at 511-12.

96. *Id.* at 512. *See generally* Longo v. Pennsylvania Elec., 618 F. Supp. 87 (W.D. Pa. 1985).

The third exception is when the activity is inherently dangerous. Here, the contractee is vicariously liable for injuries caused by his contractor unless special precautions are taken to prevent the injuries.[97] The use of this special precaution exception is appropriate when the nature of the work, even if done in the normal and contemplated manner, creates the risk of a peculiar injury, and the contractee should have anticipated the need for some special precautions.[98] The test for application of this exception, in its simplest form, is embodied in the question, is the particular risk of injury or harm foreseeable in advance by the contractee?[99]

Some courts use a collateral negligence doctrine to limit the range of the nondelegable exceptions to contractee liability.[100] This doctrine limits the vicarious liability of the contractee to events the risks of which are inherent in the nature of the work, and not to foreign or unrelated risks.[101] The essence of the collateral negligence doctrine "appears to be . . . its disassociation from any inherent . . . risk which may be expected to be created by the work."[102] In determining the applicability of this doctrine, the courts frequently look to whether the negligence was in the "operative details of the work," and as such not contemplated by the contractee, or in the "general objective or plan," which by its very nature requires risk contemplation.[103]

IV. COMPUTER DEFAMATION CASE STUDIES

Cubby v. CompuServe,[104] decided in 1991,[105] and *Stratton Oakmont Inc. v. Prodigy Services Co.*,[106] decided in 1995,[107]

97. *See* Saiz v. Belen Sch. Dist., 827 P.2d 102, 108-09 (N.M. 1992).

98. *See* Colloi v. Philadelphia Elec., 481 A.2d 616, 623-24 (Pa. 1984).

99. *See generally* Clark v. Container Corp. of Am., Inc., 936 F.2d 1220 (11th Cir. 1991).

100. *See* Deitz v. Jackson, 291 S.E.2d 282, 285 (N.C. Ct. App. 1982); Gessel v. Traweek, 628 S.W.2d 479, 481 (Tex. Ct. App. 1982).

101. *See Gessel*, 628 S.W.2d at 480-81 (son-in-law shot person mistaken for burglar); *see also* Smith v. Lucky Stores, Inc., 132 Cal Rptr. 628, 630-31 (Cal. Ct. App. 1976) (gust of wind blew sign onto pedestrian after it had been lowered to the ground and rested against a truck).

102. KEETON ET AL., *supra* note 30, at 516.

103. Schreiber v. Camm, 848 F. Supp. 1170, 1176 (D.N.J. 1994) (citing Restatement comment distinguishing operative detail and general plan); *see* KEETON ET AL., *supra* note 30, at 517.

104. 776 F. Supp. 135 (S.D.N.Y. 1991).

105. *Id.*

106. 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995).

107. On October 25, 1995, Stratton agreed to drop its $200 million libel suit against

are currently the only cases that have directly addressed the issue of computer media liability in a defamation suit by a private citizen. These cases demonstrate the potential inadequacy of traditional defamation doctrine in dealing with complex issues of liability in multi-party computer media.

A. Cubby v. CompuServe

CompuServe is a commercial BBS providing multiple sections for its subscribers to browse through. One of these sections is the Journalism Forum (JForum), which is devoted to communication about the journalism industry.[108] A daily newsletter called Rumorville USA (Rumorville), which provides reports and gossip about broadcast journalism and journalists, is available on JForum.[109]

Rumorville is published by Don Fitzpatrick Associates of San Francisco (DFA)[110] and was provided to JForum under a contract with Cameron Communication, Inc. (CCI).[111] This contract provided that DFA "accepts total responsibility for the contents" of Rumorville.[112] The contract also limited Rumorville's access to subscribers who had previous membership arrangements with DFA.[113] Additionally, CompuServe was to not receive any fees that DFA charged for access to Rumorville, nor was DFA to receive any payment from CompuServe.[114]

CompuServe contracted with CCI to "manage, review, create, delete, edit and otherwise control the contents" of JForum "in accordance with editorial and technical standards and conventions as established by CompuServe."[115]

In 1990, Cubby, Inc. and Robert Blanchard developed a competing electronic newsletter called Skuttlebut.[116] Subsequently, they sued CompuServe and Don Fitzpatrick, the

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Prodigy in return for an apology. In addition, Stratton has agreed not to oppose Prodigy's motion for the court to reconsider its ruling holding Prodigy liable as a "publisher." Elizabeth Corcoran, *$200 Million Libel Suit Against Prodigy Dropped; On-Line Industry Had Worried About Case*, WASH. POST, Oct. 25, 1995, at F2.

108. *Cubby*, 776 F. Supp. at 137.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 138.

chief executive officer of DFA, for the publication of false and defamatory statements concerning Cubby, Inc. and Blanchard on Rumorville.[117] The plaintiffs alleged libel of Blanchard, as well as unfair competition and business disparagement against Skuttlebut.[118]

CompuServe moved for summary judgement on all claims, asserting that CompuServe was acting as a mere distributor of the statements.[119] CompuServe argued that acting as a mere distributor, not a publisher, relieved it of liability because it did not know and had no reason to know of the statements that were uploaded on its computer banks.[120]

The *Cubby* court granted CompuServe's motion for summary judgement on all claims.[121] The court held that CompuServe was more like a distributor of a publication than a publisher, and because it lacked the requisite knowledge of the contents of the publication, liability could not be imposed for libel.[122] The court likened CompuServe's First Amendment protection to that routinely granted to bookstores and libraries by presuming CompuServe, like a bookstore, could refuse to carry a publication altogether, but once it actually carried the publication, it could exercise little or no editorial control over the publication's contents.[123] The court emphasized that CompuServe had minimal control because JForum is managed by a company unrelated to CompuServe.[124]

The court discussed the plaintiff's argument that CompuServe should be vicariously liable for the defamatory statements due to an agency relationship between CompuServe, CCI, and DFA. The court found that neither CCI nor DFA should be considered an agent of CompuServe.[125] The court reasoned that CompuServe had delegated most of its assembly control to CCI and had retained an insufficient amount of control to create an agency relationship.[126] The court also found the relationship between

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 137.
122. *Id.* at 141.
123. *Id.* at 140.
124. *Id.* at 143.
125. *Id.*
126. *Id.*

CompuServe and DFA to be "that of an independent contractor of an independent contractor."[127] From their findings, the court concluded that CompuServe was not vicariously liable for plaintiff's claims.[128]

The *Cubby* court's analysis is incomplete. It is short-sighted to end the discussion of publication with the simple pronouncement that CompuServe is a distributor without knowledge of the defamatory material and thus not liable. Assuming the court is correct in its analysis of CompuServe as a distributor, what about CCI and DFA, whose chief executive officer was a named defendant? DFA distributed an electronic newsletter that presumably underwent sufficient editorial control to warrant the name "newsletter." As such, DFA, through defendant Fitzpatrick, should be considered a primary publisher and subject to liability for the defamation. But the *Cubby* court failed to even address the elemental question of Fitzpatrick's liability.

Additionally, CCI, while not a named defendant,[129] maintained oversight authority over all the activities of JForum and should be regarded as JForum's SYSOP. By its decision to "control the contents" of JForum through management and editorial control, CCI moved from simply being a disinterested distributor to being a primary publisher. It is easy to analogize CCI to the editor of a magazine, with DFA (and Don Fitzpatrick) being the editor of a journalism subsection of the magazine. The court could have concluded, with further analysis, that both CCI and DFA were primary publishers.

The *Cubby* court also rather hastily concluded that there was no agency relationship among CompuServe, CCI, and DFA. Rather than the contractee-independent contractor-independent contractor (CompuServe-CCI-DFA) model that the court adopted,[130] the relationship could have been described as a contractee-agent-subagent (CompuServe-CCI-DFA) model. This alternative model would have subjected CompuServe, as the principal, to vicarious liability for the "publication" of a defamatory statement by its sub-agent, DFA. At a minimum, the relationship should have been described as contractee-

127. *Id.*
128. *Id.*
129. The suit was in federal court and CCI could arguably be seen as an indispensable party. *See generally id.* at 135; Fed R. Civ. P. 19(a).
130. *Cubby,* 776 F. Supp. at 143.

independent contractor-agent (CompuServe-CCI-DFA). This minimum alternative would have made CCI vicariously liable for the defamatory publication of its agent, DFA. Under either alternative, CompuServe would be contractually required to "indemnify CCI for claims resulting from information appearing" in JForum.[131]

DFA's and CCI's relationship could reasonably be construed as an agency relationship. Despite contractual language in which "DFA accepts total responsibility for the contents"[132] of Rumorville, the court should have looked beyond this statement to the actual conduct of the parties. CCI was contractually required by CompuServe to maintain both managerial and editorial control over the content of JForum and presumably abided by its agreement.[133] This level of oversight was sufficient for the court to conclude that the level of "control" by CCI over DFA activities rose to the level of creating an agency relationship.

The relationship between CompuServe and CCI is more difficult because their contract allowed CCI broad control over the contents of JForum while only requiring that CCI operate the forum "in accordance with editorial and technical standards and conventions of style as established by CompuServe."[134] The *Cubby* court failed to discuss whether this reservation of authority could be significant enough to constitute actionable "control." After finding that CompuServe's ultimate contractual right to edit CCI's work "merely constitutes control over the result" of the work, the court found that CompuServe's control was "insufficient to rise to the level of an agency relationship."[135] The court failed to determine whether CompuServe's reservation of authority allowed CompuServe to maintain a "management function" with regard to the activities of CCI. Editorial control and the requirement to follow and enforce guidelines could constitute sufficient "control" for agency liability.

An edit of an edit of an edit: where does editorial control, sufficient for liability, begin and end in such a blended situation?

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131. *Id.*
132. *Id.* at 137.
133. *Id.*
134. *Id.*
135. *Id.* at 143.

At the very least, the *Cubby* court should have concluded that the issue of agency was not clear and left the issue to the jury.

B. Stratton Oakmont, Inc. v. Prodigy Services Co.

Stratton Oakmont, Inc., a securities investment firm, brought suit against Prodigy Services Co. and an unidentified BBS user for statements the user made on Prodigy's "Money Talk" computer bulletin board section claiming fraudulent activity by Stratton.[136] Stratton sought a partial summary judgment on the issues of whether Prodigy was a "publisher" of the statements concerning plaintiffs and whether Charles Epstein, the SYSOP for the "Money Talk" section, acted as Prodigy's agent for the alleged acts and omissions.[137] The court granted Stratton's motion.[138]

Unlike the *Cubby* court, the *Stratton* court found that Prodigy was a primary publisher rather than a distributor based in part on Prodigy's stated policy that it was a family-oriented computer network, and in part due to Prodigy's decision to hold "itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards . . . and [because it] expressly liken[ed] itself to a newspaper."[139]

The court also relied on Prodigy's promulgation of "content guidelines," use of a software screening program that automatically prescreens for offensive language, use of a SYSOP who enforces the content guidelines, and use of an "emergency delete function" by which a SYSOP could delete a note based on content.[140] The court found that Prodigy was clearly making decisions as to content and that the practices reflected a degree of editorial control sufficient to render Prodigy a primary publisher.[141]

The court expressed its full agreement with *Cubby* that computer bulletin boards provided by BBSs should "generally be

136. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995). The "truth" of these fraudulent statements led directly to Stratton accepting an "apology" by Prodigy in return for dropping its libel suit and not contesting Prodigy's request for summary judgment in its favor. *Dodging Bullets Prodigy "Wins" Online Libel Battle*, INFO. L. ALERT: VOORHEES REP., Nov. 3, 1995.
137. *Stratton*, 23 Media L. Rep. (BNA), at 1795.
138. *Id.* at 1797, 1799.
139. *Id.* at 1795.
140. *Id.* at 1796.
141. *Id.* at 1797.

regarded in the same context as bookstores, libraries and network affiliates."[142] The court distinguished Prodigy from *Cubby* by noting the differences in Prodigy's "own policies, technology and staffing decisions . . . [that] altered the scenario and mandated the finding that it is a publisher."[143]

The court also found that Charles Epstein, the bulletin board SYSOP at the time the statements were made, was acting as Prodigy's agent.[144] The court looked beyond the language of the contract that made Epstein solely responsible and that required Epstein to indemnify Prodigy for any claim arising from Epstein's actions.[145] The court found that "at least for the limited purpose of monitoring and editing the 'Money Talk' computer bulletin board, PRODIGY directed and controlled" the SYSOP's actions to a sufficient degree to establish a principal-agent relationship.[146]

C. Potential Cyberspace Consequences

The *Stratton* court's decision blurs the line between a publisher and a distributor in the computer media. The same factors that the *Stratton* court used in support of its conclusion that Prodigy is a publisher, such as promulgation of guidelines enforced by independent contractor SYSOPs and use of software used to screen obscene language, are not unique to Prodigy. Other on-line computer servers, including CompuServe, also use independent contractor SYSOPs who enforce the corporate content and style guidelines and who can delete messages.[147] The *Stratton* decision opens the door for plaintiffs to assert that defendants exercise editorial control through various practices that are, in fact, common in the industry.

The only compelling difference between Prodigy and CompuServe appears to be Prodigy's overt actions—wielding editorial control—to position itself in the market as the BBS that provided a wholesome family product. The lesson to be learned from *Stratton* is that a BBS can preclude liability if it establishes clear policies of minimal editorial control and consistently

142. *Id.* at 1798.
143. *Id.*
144. *Id.* at 1799.
145. *Id.* at 1798.
146. *Id.* at 1799.
147. News Notes, 23 Media L. Rep. (BNA) (July 11, 1995).

adheres to those policies.[148] This lesson was not lost on Prodigy as it attempted to argue that it had long ago abandoned its policy of "manually reviewing all messages prior to posting."[149] The failure of Prodigy to disseminate the news of this change publicly, however, caused this argument to have little weight with the court.[150]

The *Stratton* court's optimistic view notwithstanding, the end result of the *Stratton* decision could be a headlong rush by the other online BBSs to minimize editorial control and become more like distributors and common carriers to avoid liability.[151] In an increasingly cut-throat economic marketplace, it is not reasonable to assume that competing companies will voluntarily assume a higher level of liability when competitive pressure on profit margins fails to cover the risk exposure the company would incur as a publisher. This headlong rush by BBSs to insulate themselves from liability as distributors will have negative

148. *See supra* notes 138-43 and accompanying text.

149. *Stratton*, 23 Media L. Rep. (BNA), at 1796.

150. *Id.* at 1796-97.

151. Conversations with communication attorneys indicate that this movement is already well on its way. Legal firms are being directed to make their clients' companies "look" like the CompuServe model. Additionally, in an effort to minimize potential exposure, access and service providers are being encouraged to:

> a. Review policies to make sure that the provider does not control the content placed on its system, or at most is given only final deletion rights, but no on-going editorial or style responsibilities.
>
> b. Review agreements with bulletin board and discussion group leaders to be sure that the contract places the responsibility for dealing with content decisions solely on the leader, subject only to final deletion rights of the provider. No language should exist that indicates leaders should defer to the provider in situations of style or management. Moreover, such agreements should provide that the leader will indemnify the provider in case of any legal action based on content under the leader's control.
>
> c. Users should be made aware of their liability for statements they post and should be informed that the provider does not edit such postings. Providers should consider online notices that appear automatically to inform users that they "own their words."
>
> d. Providers should avoid any practices or programs whereby they cruise their own discussion groups to delete material.
>
> e. To avoid vicarious agency liability for the acts of bulletin board and discussion leaders, providers should review their leader contracts to be sure that they provide such leaders with full contractual ability to decide how their forum content will be managed, subject only to the provider's right to reject the final work.

Karen S. Frank, *Potential Liability on the Internet,* 14 CABLE TEL. L. 445-46 (1996).

implications on private individuals as they can be defamed with little or no available recourse.

V. ALTERNATIVE LIABILITY AND ADEQUATE REMEDIES

Proposed solutions to the problem of defamation on computer media tend to be extreme. Laurence Tribe advocates an amendment to the Constitution that would effectively immunize the BBS industry from any liability.[152] At the other extreme is the complete and thorough screening of all messages sent to a BBS. While it is technically possible to screen all message traffic, despite the BBS industry's denial,[153] it is wholly unrealistic to assume that screening, via either mechanical or human interfaces, can identify all potential defamatory comments. Even ignoring the First Amendment problems associated with such proactive censorship, it is difficult to equitably assign full liability to a BBS or SYSOP, not engaged in "publishing," without some means of mitigating the liability.

Due to the extreme nature of these positions, neither are likely to be adopted as a legal standard. This is borne out by the courts' use of traditional defamation doctrine in its initial attempts to provide an adequate solution to defamation actions in the computer media.[154]

Recognizing that a BBS, at any moment, likely spans the spectrum of publisher liability, the main question becomes what standards of liability should apply to the BBS with respect to its status as primary or secondary publisher or common carrier? The answer depends upon the parties' inferred level of "knowledge" of the defamatory material. This, in turn, depends upon the particular functional characteristics of the computer bulletin board where the defamation occurred.

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152. Tribe's proposed amendment reads:

> This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.

Laurence H. Tribe, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier, Keynote Address Before the Conference on Computers, Freedom and Privacy (Mar. 26, 1991) (transcript available in Georgia State University College of Law Library).

153. *See* Liang, *supra* note 6, at 11.

154. *See supra* notes 109-52 and accompanying text.

BBSs and their SYSOPs should have traditional First Amendment freedoms and responsibilities for the content they create as publishers[155] and should have traditional common carrier protection for the content they cannot access or control, such as e-mail.[156]

What is missing from this approach is a determination of what responsibility a BBS or SYSOP should have as a distributor in this new media. The *Cubby* and *Stratton* approaches allow a BBS or SYSOP, by not crossing some nebulous line of "control," to be classified as a secondary publisher. This would traditionally require knowledge of the defamatory material to incur liability.[157] But what about the defamed party in the all too typical situation of an anonymous defamer? Under current doctrine, a defamed party can be harmed both personally and professionally by malicious activity on a computer bulletin board and possibly have no recourse unless it can be proven that the BBS or SYSOP acted as a primary publisher.[158]

This need not be the result if the court recognizes, as Cardozo recognized, that "with new conditions there must be new rules."[159] The court can adopt a policy in which the BBS and the SYSOP, in combination, bear some responsibility for the far-ranging and potentially destructive capabilities of their media—a "heightened distributor" liability standard.[160]

A heightened distributor liability would require the BBS to take three actions to preclude liability as a publisher: First, provide the identity of the defaming user; second, promptly remove the defamatory material; and finally, provide a right of reply for the defamed party. These actions are synergistic. Any one or two actions done separately has far less effective mitigation value.

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155. *See supra* notes 30-40 and accompanying text (subject to primary publisher liability).

156. *See supra* note 44 and accompanying text (common carrier immunity from defamation tort liability).

157. *See supra* notes 41-43 and accompanying text.

158. *See supra* notes 109-52 and accompanying text.

159. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 137 (1949).

160. At least one court has noted a need for doctrinal changes to libel and defamation occurring in a digital environment. *See* It's In the Cards, Inc. v. Fuschetto, 535 N.W.2d 11, 14 (Wis. Ct. App. 1995) ("Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services.").

By not imposing monetary damages, which would normally be available for "publisher" liability, the court can help balance the rights of the parties involved without imposing an undue burden on the computer media. The user gets the opportunity to sue the original defaming party, to have the defaming material eliminated, and to have an opportunity to reply. The BBS gets a reduction in potential liability for a few simple and inexpensive actions if all the requirements are met. Finally, the public benefits because offensive uses will decline due to potential personal liability,[161] and the forums will not be subject to undue censorship by BBSs fearful of "publisher" liability.[162]

Providing the identity of the defaming party does not act to stifle free speech.[163] Providing absolute anonymity for users is harmful for two reasons. First, absolute anonymity protects sources of information that otherwise would be reluctant to come forward. Second, it allows the "dark side" free reign as they realize they can escape responsibility for posting abusive messages. By simply keeping records by means of private individual passwords,[164] a pseudonymous traffic, a BBS can provide a defaming user's identity while allowing acceptable, nondefamatory anonymous free speech to continue on the board.[165] A user may retain social anonymity but not complete anonymity. This remedy recognizes that despite the First

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161. *See* John H. Phelan et al., *Panel 1: The Changing Landscape of First Amendment Jurisprudence in Light of The Technological Advances in Media*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 235, *267 (1995) ("I think that if you are accountable, if they know who you are, if you are not allowed to sue the system anonymously, that will be a great deterrent to the misuse of the system.").

162. *See* Matthews v. Town of Needham, 764 F.2d 58, 60 (1st Cir. 1985) (the government must prove that regulated speech is unprotected by the First Amendment); Laker Airways Ltd. v. Pan Am. World Airways, Inc., 604 F. Supp. 280, 288 (D.C. 1984) (offending speech is defamatory and such speech is not afforded First Amendment protection).

163. A case was recently filed against America Online demanding that the computer service identify the defamatory messages' author. Andrew Fegelman & James Coates, *Suit May Lift Anonymity On Internet; Should On-Line Remark's Source Be Disclosed*, CHI. TRIB., Sept. 15, 1995, at News 1.

164. *See* Phelan, *supra* note 161, at *267.

165. It is argued that advances in cryptography and the use of an anonymous remailer make possible messages that are untraceable by a BBS. *See generally* LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD (1995). However, concurrent development of "firewalls," which prevent unauthorized intrusion into board areas minimize this threat. Bill Husted, *Internet Firewall*, ATLANTA J. & CONST., Sept. 27, 1995, at F2.

Amendment guarantee of free speech, a person should ultimately be responsible for speech which is not protected.[166]

Prompt removal of defamatory information of which the BBS has knowledge is required in order to preclude liability as a primary publisher and is thus not an intrusive remedy.[167] This removal is a simple matter of keystrokes on a computer.

The constitutionally accepted right of reply[168] would go even further than the traditional mitigation method of retraction.[169] This reply provides the defamed party with the option of publishing his own version of the matter with the BBS's facilities.[170] A simple retraction by the BBS would not be sufficient unless authorized by the defamed party. Rather, the defamed party should retain the option of any reply because he may choose not to risk more potential damage by retransmitting and contesting the damaging materials.

Whether the heightened distributor standard is a reasonable standard of care owed by a BBS and a SYSOP to the public may, perhaps, be determined through application of Judge Learned Hand's concise expression of when a risk becomes unreasonable. As he described it in algebraic terms, liability turns on whether the burden of adequate precautions, B, is less than the probability of harm, P, multiplied by the gravity of the resulting injury, L.[171] In other words, liability attaches when B is less than PL. Conversely, the actor satisfies the obligation to protect against unreasonable risks when the burden of adequate precautions—examined in light of the challenged action's value—outweighs the probability and gravity of the threatened harm.[172]

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166. *See Laker Airways*, 604 F. Supp. at 280 (holding libelous statements, fighting words, and obscenities are not protected by the First Amendment).

167. *See supra* note 65 and accompanying text. Liability in this instance may also be found through application of the "physical bulletin board" cases.

168. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 372 (1969).

169. Retraction statutes normally allow a publisher to comply with a request for retraction in return for a reduction of its liability for damages. RESTATEMENT (SECOND) OF TORTS, Tentative Draft No. 20, 297 (Apr. 25, 1974). Retraction normally does not give the defamed party a suitable opportunity to publish a reply. *Id.* at 298; *see* Anne Wells Branscomb, *Symposium: Emerging Media Technology and the First Amendment: Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1671 (1995) (supporting right of reply as an adequate solution in and of itself).

170. Branscomb, *supra* note 169, at 1671-72.

171. United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947).

172. *See* Hendricks v. Todora, 722 S.W.2d 458, 461 (Tex. Ct. App. 1986) (lessee

The proposed heightened distributor standard poses a minimal burden on a BBS and SYSOP. All of its requirements are retroactive and would not impose a financial or time management burden on the BBS. Indeed, it can be argued that the benefits to the BBS industry, through reduced costs in software and human capital for defamation screening, outweigh any potential burden.[173] Conversely, the probability of defamatory speech in the computer media is high with potentially devastating and uncompensable harm.[174] With regards to defamation on BBSs, the calculus of probability and gravity of harm to an innocent party clearly outweighs any burden; therefore, a heightened distributor liability standard is reasonable.[175]

Court Methodologies

A court could apply tort and agency concepts to find at least a minimal liability for BBS sections that would traditionally be defined as distributors. An exception to the "distributor" limited liability metaphor popularly used by the courts may be used to extend liability to defamation actions on a BBS.[176] Alternatively, a court could apply a nondelegable duty exception

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restaurant or its lessor is not required to protect business invitee customers against drunken driver who crashed into restaurant's waiting area); RESTATEMENT (SECOND) OF TORTS § 291 (1965); KEETON ET AL., *supra* note 30, at 173.

173. Noting that BBSs currently "police" their products by having human operators monitor and remove offensive matter. Responding to calls about defamatory comments would be a natural extension of BBSs current activity. Peter Eisler, *Policing the Internet*, USA TODAY, Sept. 5, 1995 at 1A.

174. *See supra* Section II.B.3 of this Note.

175. It is worthy to note that the Clinton Administration's Working Group on Intellectual Property and the National Information Infrastructure advocated a standard of strict liability for online providers. *See* John Kennedy & Mary Rasenberger, *Does Cyberspace Merit a New Legal Order*, N.Y.L.J., Oct. 4, 1995, at 1 (citing the U.S. Patent and Trademark Office Information Infrastructure Task Force's White Paper entitled, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, Sept. 1995, which can be found at the U.S. Patent Office Website at http://www.uspto.gov). While acknowledging that online providers cannot monitor every message, the Working Group found their risks to be a cost of doing business. *Id.* Noting this high level of liability, the online provider industry might find the "moderate" level of liability embraced by the heightened distributor liability standard an attractive standard.

176. *See infra* notes 180-82 and accompanying text.

for independent contractors for BBS's and SYSOP's with a *Cubby* structure to extend liability.[177]

1. *Exception to Distributor Status*

The Restatement (Second) of Torts formulation for distributors requires: "[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character."[178] The Restatement further explains:

> [A] news dealer is not liable for defamatory statements appearing in the newspapers or magazines that he sells if he neither knows nor has reason to know of the defamatory article . . . . On the other hand, when a dealer offers for sale a particular paper or magazine that notoriously persists in printing scandalous items, the vendor may do so at the risk that any particular issue may contain defamatory language.[179]

This Comment proposes modifying the liability of a distributor by imputing knowledge of defamatory material to the distributor due to a recurring history of notorious or scandalous behavior. This exception to distributor nonliability would fit well within the computer media if the "particular paper or magazine" is analogized to a particular BBS computer bulletin board.

When a BBS and SYSOP allow a public message area or electronic information source, especially one focused on commercial issues, to operate with minimal editorial control, thus satisfying the *Cubby* distributor approach, it is unreasonable to fail to anticipate the continual appearance of defamatory material on the bulletin board. The introduction of commercial pressures (for example, the profit motive) and the attendant dog-eat-dog mentality make the systematic appearance of defamation for commercial advantage a virtual certainty. This is especially true in an environment with no potential liability due to the prized anonymity of source information in the computer media.[180] Finding that a bulletin board provides an opportunity

177. *See infra* notes 182-86 and accompanying text.

178. RESTATEMENT (SECOND) OF TORTS § 581 (1977).

179. RESTATEMENT (SECOND) OF TORTS § 581, cmt. d (1977).

180. Originally, the interactive computer media was used by university scholars taking advantage of the interconnected nature of the university and military computer structure. *See* Branscomb, *supra* note 173, at 1646. "Pioneer users in cyberspace

for "notorious" appearance of "scandalous" material allows a court to impose a heightened distributor liability upon the BBS for its distribution of such material by imputing knowledge to the BBS based on the media's innate capacity for defamation.

Constitutional scholars might claim that imposing such liability would have a chilling effect upon free speech by providing a barrier to the traditional guarantee of freedom of speech and of the press that the prohibition against strict liability on distributors was meant to protect.[181] It could be argued that every BBS would have an unreasonable obligaition to make itself aware of the contents of all messages posted on it.[182]

This argument presumes the BBS's lack of knowledge. The BBS operates a computer service with pervasive opportunities for defamatory activities. A BBS's knowledge that one of its forums continually publishes defamatory material should suffice to impose a heightened distribution liability, one that is less than publisher liability. A court should only require knowledge of each individual kernel of defamation within the forum if it intends to impose publisher liability on the BBS.

2. *Nondelegable Duty Exception*

An alternative means of providing equitable relief for defamed private persons can be derived from the nondelegable duty doctrine for independent contractors.[183] This doctrine is normally applied in cases of potential physical injury, but the nature of the injury alone should not proscribe its use. Defamation can result in both professional and personal injury; thus, the use of the doctrine should be applied in this instance because the harm resulting from the trauma of defamation can be every bit as real and devastating as that resulting from physical injury.

This approach would reach companies that aggressively attempt to make their BBSs emulate the CompuServe nonliable

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expected that 'legal norms of the real world' would apply." *Id.* However, "confrontations are arising between the legal expectations of the real world and the developing 'netiquette' " of cyberspace. *Id.*

181. Smith v. California, 361 U.S. 147, 152-53 (1959).

182. *Id.* at 153.

183. *See supra* notes 91-104 and accompanying text.

distributor model demonstrated in the *Cubby* case.[184] Minimal editorial control, only consistent with corporate policy, and the allocation of concomitant risks to independent contractor SYSOPs would cause a BBS to be treated as a distributor while thrusting liability onto the SYSOPs.[185]

If a BBS used independent contractors to create or publish a newsletter, the *Cubby* standard would not allow vicarious liability to be imposed on the BBS absent a clear agency relationship.[186] This places no incentive on the BBS to aid in preventing defamation on its boards. A court could find that public policy dictates that the very nature of the activities on the typical computer bulletin board, even when done in the contemplated manner, creates the risk of defamation and reputational injury and special precautions should be required of the BBS. It is an indefensible position to state that defamatory material is not likely to appear on a computer bulletin board—rather, it is all too foreseeable.

Because it is foreseeable, a court should conclude that the risk of defamation in the computer media is not a foreign or unrelated risk, but is inherent in the nature of the work and requires risk contemplation.[187] Therefore, a court should not apply the collateral negligence doctrine to limit the range of the nondelegable duty exception.[188]

Alternatively, a court could find that the public interest in protecting innocent citizens from potentially gross defamatory injury is too important to the community as a whole for the contractee to be able to delegate both responsibility and liability to a contractor.

The effect of the application of the nondelegable duty approach would be to find a BBS "distributor," with a "primary publisher" SYSOP, fully liable as a primary publisher. However, in order to foster free speech and to avoid undue censorship, this liability should be reduced by the court to the heightened distributor liability previously discussed. This is sufficient to balance the interests of the defamed, the public, and the emerging computer media.

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184. *See supra* notes 110-36, 148-52 and accompanying text.
185. *See supra* notes 148-52 and accompanying text.
186. *See supra* notes 110-36 and accompanying text.
187. *See supra* notes 101-04 and accompanying text.
188. *See supra* note 102 and accompanying text.

CONCLUSION

Three parties are involved in the posting of defamatory material on a BBS. The first party is the defamer. The defamer is fully liable for the material he publishes without regard to his motive. The second party, the BBS/SYSOP, who provides, for a profit, the medium for the widespread publication of the defamation and seeks to minimize or eliminate potential liability for the defamation, may not be held liable at all. The final party is the defamed. The defamed may or may not be a participant on the BBS, but desires some means of recovering for the emotional, reputational and potential physical damage caused by the defamation. It is ironic that the one party untainted by any unworthy motivation, the defamed, can very likely be left without recourse or satisfaction under current defamation doctrine.

The heightened distributor liability standard attempts to find an equitable balance between the parties' relevant interests. It is, in fact, a "carrot and stick" approach to the problem of defamation in the computer media. The "carrot" allows the BBS/SYSOP service provider to eliminate liability through application of a few simple and economical procedures. The "stick" allows a court to impose liability if the BBS/SYSOP fails to accomplish any of the procedures.

A BBS can eliminate its potential liability through the application of three simple and inexpensive steps: (1) providing the identification of the defaming party; (2) removing the defamatory material promptly; and (3) providing a right of reply. The defamed party gets an opportunity to sue the defaming party (the one party without a relevant interest), an elimination of the offending material, and an opportunity to reply.

The heightened distributor standard would be retroactive only. It would not require the BBS to engage in any proactive procedures to minimize its liability. As such, it would be minimally intrusive and would not act to encourage censorship or stifle free speech.

A court has three potential alternatives. First, it could simply accept that the heightened distributor standard is the relevant standard for defamation occurring on computer media. Second, a court could find the BBS/SYSOP liable by applying an exception to the "distributor" defamation doctrine through imputation of knowledge of defamatory material to the distributor based on a recurring history of notorious or scandalous behavior. Finally, a

court could derive relief through the application of the nondelegable duty doctrine for independent contractors. The second and third alternatives allow for the BBS/SYSOP to be held fully liable as a publisher. A court should reduce this liability by application of the heightened distributor standard.

What would and what should a court do to our hypothetical anonymously defamed securities lawyer introduced earlier? Unfortunately, present courts probably would not allow the defamed attorney any alternative for his damages unless the BBS or SYSOP exercised enough editorial control over that BBS section to warrant "publisher" liability. A court applying the heightened distributor standard would provide this very same attorney with a vehicle to sue the defamer and clear his name without any burden on the BBS or on free speech. This is clearly the equitable choice that a court should make.

Kean J. DeCarlo